United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1348

To be argued by
STEVEN A. SCHATTEN

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1348

UNITED STATES OF AMERICA,
Appellee,

—v.—

JOSEPH BUGLIARELLI,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Joseph Bugliarelli appeals from a judgment of conviction entered on November 7, 1975, in the United States District Court for the Southern District of New York, after a six day trial before the Honorable Edward Weinfeld, United States District Judge, and a jury.

Indictment 75 Cr. 333, filed on March 31, 1975, charged Bugliarelli, in two counts, with evading his personal income taxes for the years 1970 and 1971, in violation of Title 26, United States Code, Section 7201.

Trial commenced on September 18, 1975 and ended on September 25, 1975, with the jury finding Bugliarelli guilty on both counts.

On November 7, 1975, Judge Weinfeld sentenced Bugliarelli to concurrent two-year terms of imprisonment on each of the two counts.

Bugliarelli is at liberty pending this appeal.

Statement of Facts

The Government's Case

The Government used the specific cash expenditure method of proof to establish that, during the years 1970 and 1971, Bugliarelli's taxable income was approximately $49,000, on which he owed $12,000 in income taxes. He signed income tax returns for those two years which showed an aggregate of only $9,000 in taxable income and a resulting tax liability of only $1,500. Since Bugliarelli reported only $9,000 of his $49,000 in taxable income, he failed to pay an additional tax due and owing of approximately $10,500.

The Government's proof at trial showed that, despite Bugliarelli's $9,000 in reported income for 1970 and 1971, he expended far in excess of that amount during those years. The $9,000 which Bugliarelli reported for 1970 and 1971 derived from his alleged activities (i) as a salesman in 1970 for two employers whose names he could not remember when he was interviewed by IRS Agents (Tr. 211), and (ii) as the proprietor for eight months in 1971 of Joe's Sweet Shop, a luncheonette on Morris Avenue in the Bronx.* His $49,000 of expenditures during this period consisted of, *inter alia*, a pool and a cabana house, at a total cost in excess of $20,000 (Tr. 55-57, 103-21, 529 **), a thirty-foot Chris Craft boat (Tr. 43-48), several brand new automobiles (Tr. 14-19, 25-35), monthly mortgage payments on his home in Dobbs Ferry, New York (Tr. 51-55), and four visits to a hotel in Miami

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* There was no evidence to indicate that Bugliarelli derived unemployment insurance during the first four months of 1971, when by his account he would have been unemployed.

** References to the trial transcript are referred to herein as "Tr."

Beach, Florida (Tr. 89-91). Most of these expenditures were made in cash, which permitted Bugliarelli to avoid making legitimate financial records.*

In addition to the aforementioned cash expenditures, a bank officer at Manufacturers Hanover Trust Company testified that the bank's records indicated that Bugliarelli's wife maintained a special checking account into which approximately $4,000 was deposited in 1970, over $3,800 of which was in cash (Tr. 186), and into which $6,700 was deposited in 1971, $5,300 of which was in cash.

The bank's records also indicated that, during the period from January, 1971 until May, 1971, a period when Bugliarelli was supposedly unemployed, his wife made weekly cash deposits of $150 to $200, as was the case during the remainder of the year (GX 31-31F). Bugliarelli's wife was not gainfully employed during 1970 or 1971 (Tr. 142).

In addition to the proof that Bugliarelli was spending far more than he claimed that he earned, the Government introduced proof that Bugliarelli's source of income was his interest in a gambling operation.

On February 11, 1972, *less than 45 days after the tax years at issue*, Bugliarelli was arrested when he attempted to pay a $200 bribe to Sergeant James Blatus of the New York City Police Department to drop the gambling arrest of Bugliarelli's associate Vincent Tarallo. Tarallo had

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* Norman Bier, Bugliarelli's accountant, testified that Bugliarelli's earnings, as reported to him by the defendant, came from his activities as a salesman in 1970 and his operation of Joe's Sweet Shop in 1971. Apart from these earnings, defendant's reported income consisted of a few hundred dollars interest and dividends in each year (Tr. 142, 154-55). Bier further testified that, except for the income reported on Bugliarelli's 1970 and 1971 tax returns, Bugliarelli did not furnish him with any other information about income received.

been arrested in the Morris Avenue section of the Bronx, near Bugliarelli's luncheonette, for conducting an illegal numbers operation. (Tr. 418). Gambling records were found on the premises. Shortly after Tarallo's arrest, Bugliarelli entered the premises (Tr. 424), at which time Tarallo asked the Sergeant if he was aware that the police were being paid for protection from arrest. (Tr. 426). Bugliarelli then approached the Sergeant, told him he was a "main cousin", *i.e.*, someone well known who makes a substantial amount of illegal payoffs (Tr. 427), and offered Blatus a bribe in return for not arresting Tarallo. (Tr. 428). Bugliarelli stated that he had previously paid $125 per month for protection. (Tr. 428-29).* With that, Bugliarelli tendered $200 in tens and twenties to Blatus (GX 8). To their chagrin, Bugliarelli and Tarallo were arrested for bribery. (Tr. 429).**

To counter any suggestion that Bugliarelli's expenditures could be attributed to other sources, the Government introduced proof that a check of the records of the Surrogate's Courts in New York, Bronx and Westchester Counties did not disclose any record of bequests or devises

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* The Government also introduced the wire recording corroborating Blatus' testimony, together with the corroboration of another police officer.

** During the period in which Bugliarelli and Tarallo were being transported to the station house following the arrest, Bugliarelli gave directions to the policemen showing them the route to the nearest police station. Bugliarelli also asked Sergeant Blatus to reduce his bribery arrest to a gambling arrest. At that time, the defendant told the policeman that he was a "stand-up cousin," which meant he would pay the police and not talk about it. (Tr. 434). In this connection, Bugliarelli told Blatus to ask anyone and to inquire about him; Blatus said, "inquire where? I don't know where to start." Bugliarelli then said, "I'm Joe Bugliarelli, I've got a record. Just check my sheet." (Tr. 435). This latter testimony was stricken and the jury instructed to disregard it.

to either Bugliarelli or his wife by anyone having the name Bugliarelli or Ignelzi (Bugliarelli's wife's maiden name) (Tr. 205-07). A search of Internal Revenue Gift Tax Returns also failed to disclose any gifts to either Bugliarelli or his wife. A bank canvass and a brokerage canvass were performed which negated the possibility that the unreported $40,000 could have come from those sources.

A number of statements Bugliarelli had made to IRS Special Agents were also introduced into evidence. During the course of an interview on December 6, 1972, conducted in Bugliarelli's luncheonette, Bugliarelli, after being fully advised of his rights in accordance with a press release issued by IRS, acknowledged his ownership of Joe's Sweet Shop on Morris Avenue in the Bronx; the fact that his wife did not work and that any money in her control came from him; and that he did not borrow money from friends or relatives, except for his mother, and never received any gifts of money. During this interview, Bugliarelli falsely stated that he had never owned a boat (Tr. 343-47).*

On January 17, 1973, Bugliarelli was again interviewed in non-custodial setting by IRS Special Agents. During this interview he stated that he had worked as a salesman in 1968, 1969 and 1970, but that he did not know the names of his employers nor did he remember the names of any of his customers. (Tr. 210-11).

On June 18, 1973, Bugliarelli, during a non-custodial interview, told Special Agents that he had never received any loans or received any money from anybody but his

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* Bugliarelli expressed a desire not to answer when asked about inheritance or cash kept at home. However, at no time during this interview or at any other interview did Bugliarelli ask for counsel or ask that questioning cease.

mother (Tr. 229-30). Bugliarelli also said that he kept less than $1,000 in silver coins in his safe deposit boxes (Tr. 231). Bugliarelli further stated that he did not keep any money in his house or any place else, but kept his money in his bank account (Tr. 231-32).*

The Defense Case

The defendant Bugliarelli did not take the stand.

He called Scott Robinson, an engineer with Bolt, Beranek and Newman, who, *inter alia*, investigate and analyze tape recordings and wire recordings. Robinson testified that his firm analyzed the wire recording made on February 11, 1972 of the $200 bribe offer by Bugliarelli to Sergeant Blatus (Tr. 565-66). Robinson testified that his firm had found an unexplained discontinuity, *i.e.*, a click, on the wire recording and that his conclusion was that the wire recording had been tampered with to some degree. (Tr. 567). On cross-examination, however, Robinson testified that the so-called "mystery click" occurred at a point where fire engines could be heard on the tape, prior to Bugliarelli's entrance onto the premises. (Tr. 574). From and after the point at which Bugliarelli's voice appeared on the recording, there was no evidence whatsoever to indicate that there had been tampering of any kind. (Tr. 573-74).

The defense also called Mrs. Ann Bugliarelli ("Ann"), who testified that she was the defendant's sister-in-law, having been married to defendant's brother, Frank, who had passed away on April 10, 1969 (Tr. 581-82). Ann testified that prior to her husband's hospitalization, in or about February, 1969, a meeting took place at her home.

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* The Special Agents, knowing Bugliarelli had previously been advised of his rights pursuant to IRS regulations, did not repeat them for Bugliarelli at these latter two interviews.

The defendant and Frank and Ann Fugliarelli were present (Tr. 582-83).

Ann claimed that, during the meeting, Frank went upstairs and returned with a box. Ann further asserted that inside the box was money which Frank stacked on a table and which Frank and the defendant proceeded to count. Ann testified that the defendant said at the time, that he had counted "over $50,000." (Tr. 585-86). Frank then said there was roughly $53,000. (Tr. 586). Ann claimed that Frank then gave the money to the defendant saying:

> "If anything happens to me I want you to look out for Ann. The money is for her and the kids. My two children.
>
> You are to pay the bills, you are to take care of them. That's what you are going to do for me." (Tr. 587).

Ann testified that Frank then asked the defendant to promise that he would take care of Ann and his children, to which the defendant allegedly replied:

> "All right, if that's what you want, I promise. I promise, I promise." (Tr. 587).

Ann further testified that, after the defendant took the money, he never gave her any money in return (Tr. 588), other than $150 per week during the six weeks that Frank had been in the hospital, *i.e.*, $750. She also testified that the only money that the defendant gave to her children was that which he paid for the two children's tuition during 1969-1970 and 1970-1971 school years, *i.e.*, no more than $2,400. (Tr. 589-91). Ann also testified that her husband Frank had been a gambler, who had been arrested a few times for gambling. (Tr. 592).

On cross-examination, Ann acknowledged that, despite her trial testimony that her husband had been a gambler,

she had testified in the Grand Jury that as far as she knew her husband worked for a pastry shop. (Tr. 644-45).

Also, on cross-examination, Ann testified that, but for a case involving her son's car accident, she could not remember having been involved in any other civil proceeding. (Tr. 612-13). She further testified that she did not know that her husband had ever told anyone that he was financially desperate and that she did not know that either she or her husband made a statement in 1966-1968 that they could not meet their legal expenses. (Tr. 619-20).

Ann was then confronted with her and her husband's joint affidavit sworn to on October 21, 1967 and filed in a Bronx Civil Court proceeding involving a $600 claim instituted against them by Teresa Weinberg, Ann's niece (GX 120A), in which it was stated that the Bugliarellis were financially unprepared to pay counsel fees for trial in October 1967 (Tr. 624-26, 629).

Ann then testified that she personally—and not her husband Frank—made the settlement payments and that she made each and every settlement payment. (Tr. 631-35). Furthermore, under the terms of the settlement, Teresa Weinberg was to be paid a total of $400, a down payment of $100 and, thereafter, at the rate of $10 per week until the full amount was paid. (Tr. 632-33). (*See, infra*, p. 9). On rebuttal, the Government showed that, despite Ann's testimony that the judgment had been fully and properly satisfied, the Bugliarellis defaulted. Various other inconsistencies were brought out in Ann's testimony.*

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* As defense counsel concedes (Brief at 3 n. 1), the jury had ample evidence to totally reject Ann's testimony which proferred a cash hoard defense.

The defense also called Bronx County Assistant District Attorney Roger Milch who testified that police records show that Frank Bugliarelli, the defendant's brother, had been arrested for gambling on December 3, 1968, and also testified to certain matters involving his work on the $200 payment case involving defendant's February 11, 1972 arrest.

The Government's Rebuttal Case

In rebuttal, the Government called Chanda Sheth, employed in the medical records section at Trafalgar Hospital, who testified, contrary to Ann Bugliarelli's testimony (Tr. 616-17), that at the time of Frank's death, a balance of $816 was owed by Frank Bugliarelli to the hospital, no part of which has ever been paid. (Tr. 681).

Lester Fetell, attorney for the plaintiff in *Teresa Weinberg* v. *Ann Bugliarelli and Frank Bugliarelli*, testified that the $600 lawsuit was instituted in 1963 and had been settled for $400 in 1967, on payment of $100 down and $10 per week thereafter. (Tr. 689). Fetell further testified that, after the Bugliarellis defaulted in March, 1968, he obtained a default judgment in an amount of approximately $600 or $700, in addition to what had previously been paid. (Tr. 691-92). When Ann finally sold her home in May 1970, subsequent to Frank's death, Fetell collected on the judgment out of the proceeds of the sale (Tr. 692). Fetell also testified that the total amount collected from the Bugliarellis had been $872, whereas had the settlement terms been met, only $400 would have been paid. (Tr. 693). Also introduced were copies of certain $10 checks, all signed by Frank Bugliarelli, which were payments on the settlement prior to default. (Tr. 694; GX 133). This directly contradicted Ann Bugliarelli's testimony that she had made the payments. (Tr. 631-32).

ARGUMENT

POINT I

Bugliarelli's admissions to the IRS Special Agents during a non-custodial interview on June 18, 1973 were properly admitted at trial.

Bugliarelli argues that the IRS Special Agents who interviewed him during the course of a non-custodial meeting on June 18, 1973 were required to advise him of IRS's administratively prescribed version of the *Miranda* rights and that their failure to do so mandated suppression at trial of the admissions he made on that date. Three separate and independent grounds require rejection of this argument: (1) Bugliarelli failed to timely move to suppress the admissions he made on June 18, 1973; (2) the Special Agents fully complied with IRS procedures; and (3) suppression is not an appropriate remedy for non-compliance with IRS procedures such as these which are not constitutionally required.

Although the Supreme Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), only requires that a suspect be advised of his constitutional rights when he is in "custody",* the IRS has gone beyond constitutional requirements and directed its Special Agents to advise taxpayers during initial non-custodial interviews that they have the right to remain silent; that anything they say can be used against them; and that they have a right to consult an attorney before answering any questions. At his initial non-custodial interview with Internal Revenue Agents on December 6, 1972, Bugliarelli was afforded the administrative warnings as required by Internal Revenue

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* See, *e.g.*, *United States* v. *Caiello*, 420 F.2d 471 (2d Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970); *United States* v. *Beckwith*, 510 F.2d 741 (D.C. Cir.), *cert. granted*, 422 U.S. 1006 (1975); *United States* v. *Browney*, 421 F.2d 48 (4th Cir. 1970).

Service News Release No. 897, issued October 3, 1967,* and Internal Revenue Service News Release No. 949, issued November 26, 1968.** The Special Agents first

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* IRS News Release No. 894 provides:

"In response to a number of inquiries the Internal Revenue Service today described its procedures for protecting the Constitutional rights of persons suspected of criminal tax fraud, during all phases of its investigations.

Investigation of suspected criminal tax fraud is conducted by Special Agents of the IRS Intelligence Division. This function differs from the work of Revenue Agents and Tax Technicians who examine returns to determine the correct tax liability.

Instructions issued to IRS Special Agents go beyond most legal requirements to assure that persons are advised of their Constitutional rights.

On initial contact with a taxpayer, IRS Special Agents are instructed to produce their credentials and state: As a special agent, I have the function of investigating the possibility of criminal tax fraud.

If the potential criminal aspects of the matter are not resolved by preliminary inquiries and further investigation becomes necessary, the Special Agent is required to advise the taxpayer of his Constitutional rights to remain silent and to retain counsel.

If it becomes necessary to take a person into custody, Special Agents must give a comprehensive statement of rights before any interrogation. This statement warns a person in custody that he may remain silent and that anything he says may be used against him. He is also told that he has the right to consult or have present his own counsel before making a statement or answering any questions, and that if he cannot afford counsel he can have one appointed by the U.S. Commissioner.

IRS said although many Special Agents had in the past advised persons, not in custody, of their privilege to remain silent and retain counsel, the recently adopted procedures insure uniformity in protecting the Constitutional rights of all persons." 7 CCH 1967 Standard Fed. Tax Rptr. ¶ 6832.

** IRS News Release No. 949 provides:

"Changes in the procedure for advising taxpayers of their rights during an investigation conducted by a Special Agent of the IRS Intelligence Division were announced today by the Internal Revenue Service.

[Footnote continued on following page]

introduced and identified themselves, explained their function, and then read Bugliarelli the IRS administrative warnings. (Tr. 326-38, 344).

Specifically, Bugliarelli was advised that he could not be compelled to answer any questions or submit any information; that anything which he said or any information which he submitted could be used against him; and that he had the right to seek the assistance of an attorney before proceeding or before responding. (Tr. 327-28). During this interview, Bugliarelli answered most of the questions and refused to answer others. He at no time requested that all questioning cease or asked to consult an

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The new procedure goes beyond most legal requirements that are designed to advise persons of their rights.

One function of a Special Agent is to investigate possible criminal violations of Internal Revenue laws. *At the initial meeting with a taxpayer, a Special Agent is now required to identify himself, describe his function, and advise the taxpayer that anything he says may be used against him. The Special Agent will also tell the taxpayer that he cannot be compelled to incriminate himself by answering any questions or producing any documents, and that he has the right to seek the assistance of an attorney before responding.*

Previously, the Special Agent identified himself and described his function at the first meeting with the taxpayer but was not required to give further advice unless the taxpayer was in custody or the investigation proceeded beyond the preliminary stage.

IRS has made no change in its existing instructions that if it becomes necessary to interview a person who is in custody, an Agent must give a comprehensive statement of rights before any interrogation. This statement warns the person in custody that he may remain silent and that anything he says may be used against him.

A person in custody also must be told that he has the right to consult or have present his own counsel before making a statement or answering any questions, and that if he cannot afford counsel he can have one appointed by the U.S. Commissioner." 7 CCH 1968 Standard Fed. Tax Rptr. ¶ 6946 (emphasis supplied).

attorney. No claim is raised, nor could one fairly be made, that the Special Agents did not scrupulously comply with IRS procedures during this initial interview.

On June 18, 1973, Bugliarelli, who was neither in custody nor under arrest or indictment, was again interviewed by IRS Special Agents. At that time, in response to questions about where he kept his money, Bugliarelli told the agents that he kept no money at any location but his bank. No advice of rights was furnished during the course of this interview.

At trial Special Agent Mongelli testified to Bugliarelli's June 18, 1973 statements without objection. Only after a weekend recess, while Special Agent Mongelli was being cross-examined, did defense counsel first voice an objection to Mongelli's testimony. (Tr. 237).*

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* Defense counsel offers this Court the same lame justification for his failure to object in a timely fashion that was rejected by the trial judge below. His excuse is that he had not previously been aware that the IRS Special Agents had not advised Bugliarelli of his rights on June 18, 1973. (Brief at 19 n. 17.) Contrary to this contention, defense counsel had received a copy of the report of the June 18, 1973 interview with the defendant in June 1975—some three months prior to trial. Although the report of the first interview on December 6, 1972—which defense counsel received at the same time—makes clear reference to the warnings furnished, the report of the June 18, 1973 meeting contains no such indication, thus plainly putting defense counsel on notice as to the lack of any warnings at the June 1973 interview. In any event, all defense counsel presumably had to do in order to learn these facts was ask his client prior to trial whether or not he had been advised of his rights at each and every interview or, if counsel had still been in doubt after such an inquiry, request the Government to clarify the matter. If these simple procedures had been followed, any dispute about the admissibility of the statements could have been resolved prior to trial or at least prior to their receipt into evidence.

Judge Weinfeld, in denying defense counsel's motion to strike the Special Agent's direct testimony, ruled first that the motion was untimely. Judge Weinfeld found that, since an inspection of this material which had been in the possession of the defense for some time prior to trial would have revealed that Bugliarelli had not again been advised of his rights on June 18, 1973, there was no excuse for delaying a motion for suppress until after the Special Agent's direct testimony and after a weekend's adjournment. (Tr. 243-44). Secondly, Judge Weinfeld ruled that, even if the motion had been timely, he would have rejected it on the merits, since *Miranda* did not require that Bugliarelli be advised of his rights during a noncustodial interview and, under the circumstances presented, the procedures of the IRS could not create a constitutional right that did not otherwise exist. (Tr. 244-45).

These rulings were clearly correct. Bugliarelli's failure to move in a timely fashion to suppress the statements precludes him from objecting here. Rule 12(b)(3) of the new Federal Rules of Criminal Procedure, which became effective December 1, 1975, requires that motions to suppress evidence be made prior to trial or else they are waived. See Rule 12(f), F.R.Cr.P. This rule, requiring pre-trial motions to suppress, simply codifies prior existing practices with respect to motions to suppress allegedly illegal confessions. Advisory Committee Note to Fed. R. Cr. P. 12; *cf. Nardone* v. *United States*, 308 U.S. 338, 341-42 (1939); *United States* v. *Allison*, 414 F.2d 407, 410 n.5 (2d Cir.), *cert. denied*, 396 U.S. 968 (1969); *United States* v. *Blackwood*, 456 F.2d 526, 529 (2d Cir.), *cert. denied*, 409 U.S. 863 (1972). But not only did Bugliarelli fail, as required, to make his suppression motion *prior* to trial, he also failed to make a timely motion *during* the trial. The motion was not made at the time the statements were introduced, but only after a weekend recess during cross-examination. Surely, this was not a "timely" evidentiary objection as required by Rule 103 of the Federal

Rules of Evidence, and Judge Weinfeld was acting well within his discretion in rejecting the tardy motion.

Even assuming a proper and timely objection had been made to the admission of the statements, suppression would not be required, since Bugliarelli has made no showing that there was a failure to comply with IRS procedures. Bugliarelli apparently contends that, when the two IRS News Releases, Nos. 897 and 949, are read together, they require that Special Agents advise taxpayers of their rights at every interview. Specifically he contends that, while Release No. 897 requires that the taxpayer be advised of his rights only at a second interview with Special Agents, amendatory Release No. 949, which requires that the taxpayer be advised of his rights at the first interview, did not alter the requirement of Release No. 897 that the taxpayer be warned at any second interview. (Brief at 20-21). This reading of the releases is farfetched, since IRS News Release No. 949 was obviously intended to amend and supersede IRS News Release No. 894. Moreover, Bugliarelli has offered not an an iota of support for his view that his claimed interpretation of the releases in fact reflects IRS's practices. In fact, the evidence adduced at trial indicated that it was the practice of IRS Special Agents to notify the taxpayer of the administratively prescribed warnings only at the initial contact with the taxpayer. (Tr. 348-349; see also Tr. 221). On this record, with all of the evidence pointing to the fact that IRS fully and in good faith complied with its own procedures and no evidence having been offered to the contrary except Bugliarelli's farfetched reading of the Releases, suppression, based on the principle that an agency ought to consistently follow its own regulatory procedures, would be an extraordinarily inappropriate

remedy.* See *United States* v. *Morse*, 491 F.2d 149, 156 (1st Cir. 1974); *United States* v. *Dawson*, 486 F.2d 1326, 1329-30 (5th Cir. 1973); *United States* v. *Mathews*, 464 F.2d 1268, 1269-70 (5th Cir. 1972); *United States* v. *Bembridge*, 458 F.2d 1262, 1264 (1st Cir. 1972). In this connection, we note that it is well-settled that non-fraudulent deviations by agents of other federal agencies from their respective internal interviewing instructional manuals, whether or not any editions of such have ever been published or otherwise publicized, are of no moment. *E.g.*, *United States* v. *Bradley*, 447 F.2d 224 (2d Cir.), *cert. denied*, 404 U.S. 947 (1971) (U.S. Postal Inspection); *United States* v. *Hall*, 493 F.2d 904 (5th Cir.

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* The cases upon which Bugliarelli purports to reply are simply not in point. In *United States* v. *Sourapas*, 515 F.2d 295 (9th Cir. 1975); *United States* v. *Leahey*, 434 F.2d 7 (1st Cir. 1970); and *United States* v. *Heffner*, 420 F.2d 809 (4th Cir. 1969), the IRS Agents *never gave proper warnings*. Here, as Bugliarelli himself concedes, on December 6, 1972, "in accordance with the announced procedural guidelines of the Internal Revenue Service, as set fourth in 'IRS News Releases Nos. 897 and 949,' *supra*, defendant was read his rights." (Brief at 18) The IRS regulations require no more.

Equally inapposite is *United States* v. *Bettenhausen*, 499 F.2d 1223, 1231 (10th Cir. 1974). There, a number of interviews were conducted with the defendant and each time he received only some of his warnings. Since the record did not disclose which warnings the defendant received at which interview, the Court could not determine the extent of compliance with the releases. The court in no way indicated, however, that, if the defendant had initially received the full panoply of his rights, it would have been necessary for the agents to repeat the warnings at later interviews in order to be in compliance. Indeed, the true significance of *Bettenhausen* is in the support it provides for the Government's position. For despite the Tenth Circuit's conclusion that the extent of compliance by the agents could not be determined, it refused to suppress the taxpayer's statements in the absence of a showing by the defendant that non-compliance was prejudicial. In the present case, Bugliarelli has failed to demonstrate any non-compliance whatever. Additionally, Bugliarelli has never alleged that a repetition of the warnings he had been given only six months before would have resulted in his not making the statements that he did. In other words, he has not shown prejudice.

1974), *cert. denied*, 422 U.S. 1044 (1975) (U.S. Secret Service); *United States* v. *Castellana*, 488 F.2d 64 (5th Cir. 1974) (FBI); *United States* v. *Thompson*, 475 F.2d 1359 (5th Cir. 1973) (I.N.S. Border Patrol); *United States* v. *Sicilia*, 475 F.2d 308 (7th Cir.), *cert. denied*, 414 U.S. 864 (1973) (FBI); *United States* v. *Sosa*, 469 F.2d 271 (9th Cir. 1972), *cert. denied*, 410 U.S. 945 (1973) (U.S. Customs); *United States* v. *Thomas*, 475 F.2d 115 (10th Cir. 1973) (U.S. Marshall); *United States* v. *Fish*, 432 F.2d 107 (4th Cir. 1970) (FBI).

Moreover, even assuming that Bugliarelli could somehow show that he had properly objected and that the Special Agents had failed to comply with IRS procedures, suppression of Bugliarelli's statements would still not be warranted. In the recent case of *United States* v. *Leonard*, Dkt. No. 75-1153, slip op. 5843 (2d Cir., Aug. 28, 1975) (Friendly, J.), this Court expressed, without deciding, its strong reluctance to impose an exclusionary rule in such circumstances:

> "[A] period of increasing disenchantment with the exclusionary rule, see *Bivens* v. *Six Unknown Federal Agents*, 403 U.S. 388, 412-18 (1971) (dissenting opinion of the Chief Justice); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 266-69 (1973) (concurring opinion of Mr. Justice Powell, joined by the Chief Justice and Mr. Justice Rehnquist); see also *United States* v. *Burke*, — F.2d — (2d Cir. 1975), slip opinion 3571, 3588-90, would not seem to be a good time for us to embrace a rule that when an agency voluntarily publishes a press release announcing that it will extend to suspects more procedural protection than the Constitution or a statute demands, any violation, however unintentional or excusable, will lead to suppression." *Id.* slip op. 5862.

See *United States* v. *Schwartz*, 176 F. Supp. 613, 615 (E.D. Pa. 1959), *aff'd on other grounds*, 283 F.2d 107 (3d Cir. 1960), *cert. denied*, 364 U.S. 942 (1961).

Furthermore, an exclusionary remedy seems particularly inappropriate in the circumstance of this case, since no claim is raised that the statements were anything but voluntary and since a congressional statute now reflects the policy that all voluntary statements are admissible. Title 18, United States Code, Section 3501; *United States* v. *Collins*, 462 F.2d 792, 796 n.5 (2d Cir.), *cert. denied*, 409 U.S. 988 (1972).

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* Moreover, in this case, even if the IRS regulations had been violated and even assuming *arguendo* that the Court were to refuse to adhere to the views espoused in *Leonard*, defendant's conviction should not be reversed since any error thus committed would be harmless. Defendant's contention is that the Government was required to establish in its direct case the amount of cash that Bugliarelli kept at home and that, without defendant's June 18, 1973 admission that he kept no money in his house or anywhere else except in his bank accounts, defendant would have been entitled to a judgment of acquittal at the conclusion of the Government's case. (Brief at 19-20).

Contrary to defendant's claim, since the Government introduced evidence of a likely source of income by reason of Bugliarelli's interest in a gambling operation, the Government was not required to negate all of the possible non-taxable sources supporting the alleged net worth increase. *Holland* v. *United States*, 348 U.S. 121 (1954); *United States* v. *Massei*, 355 U.S. 595 (1958); *United States* v. *Terrell*, 390 F. Supp. 371, 375 (S.D.N.Y. 1975) (Weinfeld, *J.*). Additionally, even without defendant's admissions, the Government established defendant's bank balances and stock market positions; negatived other banking relations and brokerage accounts by its canvasses; and demonstrated the absence of inheritances and gifts by Surrogate Court records and Gift Tax Returns. In sum, the Government clearly fulfilled its burden of establishing its case.

* * * * *

In passing, we note that defendant's claim (Brief at 20), that information was elicited at the June 18, 1973 interview as to cash on hand which was not forthcoming on December 6, 1972, is flawed. The question which Bugliarelli declined to answer on December 18, 1972 was whether he kept cash at home; in June 1973, defendant was asked where he kept his money, to which he replied he did not keep his money at home or at any place else, except in his bank accounts. Neither did defendant at any time raise this matter below.

POINT II

The Trial Judge properly admitted the wire recording of Bugliarelli's February 11, 1972 payment of $200 to drop the gambling arrest of his associate Tarallo, and other evidence relating thereto, as relevant to Bugliarelli's likely source of income. The other contentions regarding the wire recording are without merit.

Bugliarelli claims that introduction of the wire recording made during his arrest for bribery on February 11, 1972, as well as the introduction of the $200 bribe money, the testimony of the two arresting police officers and the corroborative testimony of a Bronx Assistant District Attorney, was reversible error because the evidence had no relevance to the charges and was highly prejudicial. This contention is meritless, as Judge Weinfeld concluded below. (Hearing of 9/17/75, Tr. 5-8)

A. Proof of the Offer of the Bribe was Plainly Relevant to Proof of a Likely Source of Income.

Briefly, the evidence adduced in connection with the February 11, 1972 wire recording was as follows:

Less than 45 days after the tax years at issue, Bugliarelli was arrested when he paid $200 to Sergeant Blatus to drop the gambling arrest of his associate Tarallo. When Tarallo was arrested by Sergeant Blatus in the Morris Avenue section of the Bronx, near Bugliarelli's luncheonette (Tr. 418), gambling records were found which reflected an illegal numbers operation. Shortly after Tarallo's arrest, Bugliarelli entered the premises. (Tr. 424). Tarallo then asked the Sergeant if he was aware that the place was a "pad", *i.e.*, an illegal gambling operation wherein the police are paid for protection from arrest. (Tr. 426). Tarallo inquired of Blatus what he thought it was worth

and how many men he had. When Blatus told Tarallo how many men he had, Tarallo replied: "Let me speak to Joe." Tarallo and Bugliarelli, who had introduced himself as "Lorelli," then had a conversation following which Bugliarelli approached the Sergeant and told him he was a "main cousin", *i.e.*, someone well-known who makes a substantial share of illegal payoffs. (Tr. 427). Bugliarelli also told Blatus he wanted to straighten the matter out and that Blatus should not arrest Tarallo. Bugliarelli first offered to sell Blatus the pad. (Tr. 428). He then told Blatus that he had previously been paying $125 per month for the pad. (Tr. 428-29). With that, Bugliarelli paid Blatus $200 in tens and twenties (GX 8), and was arrested for bribery. (Tr. 429).

On the way to the stationhouse following the arrest, Bugliarelli gave directions to the policemen showing them the route to the nearest police station. Bugliarelli also asked Sergeant Blatus to reduce his bribery arrest to a gambling arrest. At that time, the defendant told the policeman that he was a "stand-up cousin", which meant he would pay the police and not talk about it.

To corroborate Blatus' testimony the Government introduced a wire recording made at the time of the bribe, the $200 in currency, the testimony of another police officer who was present, and, through the testimony of an Assistant District Attorney, Bugliarelli's *voir dire* at the time he pled guilty to bribery.*

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* The Assistant District Attorney was called as a defense witness to testify that police records showed that Frank Bugliarelli, the defendant's brother, had been arrested for gambling on December 8, 1968, and to testify as to certain facts in an effort to demonstrate that Sergeant Blatus had tampered with the wire recording. On cross-examination, the Government introduced Bugliarelli's admission at the time of his guilty plea that he had given the police $200 in trying to work out a deal whereby they would drop the charges against Tarallo who was involved in a gambling operation. (Tr. 675).

At the time that the testimony concerning the $200 payment by Bugliarelli was first adduced, Judge Weinfeld instructed the jury that the only purpose for which Sergeant Blatus' testimony was being received "is to show that the government contends that the defendant had an interest in gambling activities. The government is going to urge upon you that this activity, if you believe—and it is up to you whether or not you credit his testimony—reflects an interest in gambling activities as a source of income. We are not concerned with any aspect of the alleged bribery as such." (Tr. 429). A similar limiting instruction was repeated in the Court's charge. (Tr. 786-87; see Tr. 670-71).

Judge Weinfeld clearly did not abuse his discretion in determining that the probative value of this evidence outweighed its prejudicial effects. See Fed. R. Evid. 401, 402. It was important, if not essential, for the Government to establish a likely source of income for Bugliarelli during 1970 and 1971, *Holland* v. *United States*, 348 U.S. 121 (1954), and the acts, statements and circumstances surrounding the $200 payment to drop Tarallo's arrest were clearly relevant and admissible as tending to show that Bugliarelli was involved in an income producing gambling enterprise during those years.

The testimony of Sergeant Blatus and the wire recording established that, just a month and a half after the 1970 and 1971 tax years, Bugliarelli himself admitted to having paid off the police at the rate of "a hundred and a quarter a month" (GX 9, p. 8), thereby indicating that the gambling operation had been in existence during the relevant period. Moreover, Bugliarelli's efforts to sell Blatus the pad (Tr. 428) evidence his ownership of the gambling enterprise. Additionally, Bugliarelli admitted to being a "main cousin" and that he knew a lot of policemen who would tell Sergeant Blatus that he could be trusted to pay off. (Tr. 434). From all this the jury

could certainly infer that Bugliarelli had a lengthy involvement in gambling which did not commence in February 1972, as defendant urged at trial. The corroboration of Blatus * by the wire recording, the $200 in cash, the testimony of another arresting officer, and the testimony of Bronx Assistant District Attorney who was present when Bugliarelli pled guilty to paying the $200 to Blatus certainly lent added support to the reasonableness of this inference.**

Judge Weinfeld's decision to admit evidence concerning the facts and circumstances of the attempted bribe is fully supported by the case law. It is well-settled in this Circuit that "evidence of other criminal offenses is admissible if it is relevant for some purpose other than merely to show a defendant's criminal character, provided

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* The credibility of Sergeant Blatus was undercut when, during cross-examination, he refused to answer whether he was a member of the Sergeant's Club—an organization whose principal function was the splitting of illegal payoffs—until he consulted counsel. It was further undercut when the defense adduced testimony to the effect that one portion of the recording had been tampered with, impliedly by Blatus. In seeking to introduce corroborative evidence, the Government was not therefore, as Bugliarelli suggests, seeking to prejudice the defendant by repeating well-established proof; rather, it was attempting to prove its case with the most reliable evidence available.

** Bugliarelli claims that the Government went too far in using the Assistant District Attorney to introduce the minutes of the defendant's plea to February, 1972 offense when it read to the jury the Assistant's factual recitation of the events of February 11, 1972. However, any alleged problem was surely cured by Judge Weinfeld's prompt decision to strike the testimony (Tr. 675), and the instruction which he furnished. *United States* v. *Bynum*, 485 F.2d 490, 503 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974); *United States* v. *Stromberg*, 268 F.2d 256, 269 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959). In any event, this factual recitation was merely duplicative of what the jury had already heard on the wire recording and in the testimony of the police officers. Accordingly, any error was clearly harmless.

that its potential for prejudicing the defendant does not outweigh its probative value." *United States* v. *Papadakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975). See also *United States* v. *Eliano*, 522 F.2d 201, 202 (2d Cir. 1975); *United States* v. *Torres*, 519 F.2d 723, 727 (2d Cir. 1975); *United States* v. *Gerry*, 515 F.2d 130, 140-141 (2d Cir. 1975). Here, it is plain that the evidence was not offered to prove criminal character, but rather to prove a likely source of income.

In a similar case, the Second Circuit has held evidence that a defendant had bribed policemen in order to cover up a gambling operation was properly admitted in an income tax case to show, *inter alia*, that defendant's activities generated enough income to pay off policemen and that defendant had a source of income which he was concealing. *United States* v. *Vario*, 484 F.2d 1052, 1056 (2d Cir. 1973), *cert. denied*, 414 U.S. 1129 (1974); see also *United States* v. *Eliano*, 522 F.2d 201, 201 (2d Cir. 1975) (admission of prior state conviction for causing another to engage in prostitution, *held* admissible to show likely source of income in tax evasion prosecution); *United States* v. *Marquez*, 332 F.2d 162, 164 (2d Cir. 1964).

To all of this, Bugliarelli unconvincingly replies that it cannot be assumed that simply because he was involved in gambling in February, 1972, he was also in the gambling business during 1970 and 1971. In support of this contention he relies on cases which support the proposition that, if a state of facts exist on one date, they will not be presumed to have existed before that time. See *McFarland* v. *Gregory*, 425 F.2d 443, 447 (2d Cir. 1970); *Russell, Poling & Co.* v. *Conners Standard Marine Corp.*, 252 F.2d 167, 170 (2d Cir. 1958); *Berwind White Coal Mining Co.* v. *City of New York*, 48 F.2d 105 (2d Cir. 1931). What Bugliarelli so plainly overlooks is that the very cases he cites make clear that the reasonableness of the inference that the present state of facts existed

Equally unconvincing is Bugliarelli's claim that the Government failed to offer any corroboration of his admissions that, in order to protect his gambling establishment, he had been paying off police officers. *Smith* v. *United States*, 348 U.S. 147 (1954). It is well-settled that evidence corroborative of inculpatory statements need only establish that the statements were reliable or that the crime charged had in fact been committed. *United States* v. *Marcus*, 401 F.2d 563, 565 (2d Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969); *United States* v. *Terrell*, 390 F. Supp. 371 (S.D.N.Y. 1975); *United States* v. *Pawlak*, 352 F. Supp. 794, 797 (S.D.N.Y. 1972). Surely, Bugliarelli's statement that he had previously been paying off police officers was corroborated by the very fact that he paid a $200 cash bribe on the day of his arrest.* Further, aside from the inherent reliability of Bugliarelli's statements—made as they were during the course of an enterprise to corrupt a police officer—the evidence of vast expenditures by Bugliarelli and the evidence negating non-taxable sources of income provided substantial corroboration for the statements. See *Smith* v. *United States*, *supra*, 348 U.S. at 157; *United States* v. *Calderon*, 348 U.S. 160, 167-68 (1954). Of course, if

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fendant realized money from the numbers operation in 1938. In affirming the conviction, the Supreme Court ruled that "inquiry into petitioner's income for 1938 was relevant to the issue in the case," 318 U.S. at 195, namely whether Johnson had unreported income in 1937.

In *Terrell*, a tax evasion case, the Court concluded that it could infer from the defendant's admissions that, in 1969, he had realized $60,000 per day from narcotics activities that this state of affairs continued both in 1968 and 1970, absent a showing of a material change in circumstances.

* Interestingly, in almost the same breath in which Bugliarelli claims that there was no corroboration of the statement that he was bribing police officers, he argues that it was prejudicial to admit the $200 in bribe money into evidence. (Compare Brief at 36-37 with Brief at 29-30).

Bugliarelli's statements were believed, the reason why no other *direct evidence* as to gambling activities in 1970 and 1971 was adduced is obvious: he was successfully paying off policemen during that period.

Utterly frivolous is Bugliarelli's claim that it was highly prejudicial to permit the police officers to testify concerning what they saw, did and heard before Bugliarelli entered the gambling establishment on February 11, 1972. Specifically, he argues it was error to allow the officers to testify that they "found Tarallo with gambling records, including tally sheets and money" and that they arrested him for "illegal gambling, mutual horse race policy." (Brief at 27-28 & n.23). Since it was essential to an understanding of Bugliarelli's later actions to understand what had preceded them, and therefore what motivated him, Judge Weinfeld was clearly correct in allowing this testimony into evidence. Moreover, the events which took place prior to Bugliarelli's entry onto the gambling premises were important in establishing the income producing activities in which Bugliarelli had an interest. Additionally, in view of Bugliarelli's $200 payment to drop Tarallo's gambling arrest, Bugliarelli's statements attempting to sell the Sergeant the pad and the other evidence, it was proper to conclude that Tarallo was Bugliarelli's agent in connection with the gambling enterprise, *United States* v. *Alsondo*, 486 F.2d 1339, 1346-47 (2d Cir. 1973), *rev'd on other grounds sub nom. United States* v. *Feola*, 416 U.S. 935 (1974); Rule 801(d)(2)(D), Fed. R. Evid., and therefore that Tarallo's statements and actions were admissible against Bugliarelli.

Finally, in response to Bugliarelli's general claim "that any probative value [in the events of February 11, 1972] was bottled up in this morass of prejudicial 'evidence,'" (Brief at 26-27), we think it appropriate to quote from this Court's opinion in *United States* v. *Cirillo*, 468 F.2d

1233, 1240 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973), where a similar claim was rejected:

> "While the testimony may very likely have worked to prejudice the appellant, it did so because the evidence was damning, not because its introduction was an error. . . . Judge Weinfeld's careful cautionary instructions as to the limited purpose for which the evidence was introduced, delivered prior to the admission of [the] testimony and repeated in the closing charge, secured to [the defendant] all the protection he was entitled." *

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* Bugliarelli suggests that the prosecutor improperly responded to charges made in the defense summation that Sergeant Blatus was a corrupt police officer by stating that, if Blatus was corrupt, it was persons like Bugliarelli, who paid off policemen, who contributed to the corruption. (Tr. 757). First, it is illuminating that the remark now assigned as improper in this Court was considered of so little moment below that defense counsel neither objected during or after the summation. See *United States* v. *Sawyer*, 347 F.2d 372, 374 (4th Cir. 1965). It is well settled that when defense counsel fails to object either during or after summation, "an appellate court will reverse only if the summation was so 'extremely inflammatory and prejudicial' . . . that allowing the verdict to stand would 'seriously affect the fairness, integrity or public reputation of judicial proceedings.'" *United States* v. *Briggs*, 457 F.2d 908, 912 (2d Cir.), *cert. denied*, 409 U.S. 986 (1972); see also *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-39 (1940); *United States* v. *Perez*, 426 F.2d 1073, 1081 (2d Cir. 1970), *aff'd*, 402 U.S. 146 (1971). This was hardly such a case. The prosecutor's argument that Bugliarelli was paying off other policemen, and that therefore calling Blatus "a man of corruption" was simply the pot calling the kettle black, was fully supported by Bugliarelli's admissions on the wire recording that he was a "main cousin," a "stand-up cousin" and that he was paying $125 per month to other policemen to protect the particular location at which he was arrested.

Moreover, the challenged remarks came only in the prosecutor's rebuttal summation following defense counsel's summation which, without any evidentiary basis, (a) accused the prosecution of inflaming the jury and appealing to prejudice (Tr. 723, 724,

[Footnote continued on following page]

B. Bugliarelli's Contention That References to His Arrest Record, All of Which Were Stricken, Were Prejudicial, Is Without Merit.

Bugliarelli claims that the Government improperly introduced testimony concerning his arrest record and that accordingly his conviction should be reversed. This claim is utterly without merit.

The pertinent facts on this claim are as follows:

Sergeant Blatus testified that following Bugliarelli's arrest for bribery by reason of the $200 payment, Bugliarelli had endeavored to get Blatus to reduce the arrest from a bribery charge to a gambling charge. Bugliarelli in this connection told Blatus that he was a "stand-up cousin" and asked Blatus to inquire about him. When Blatus said "I don't know where to start," Bugliarelli replied, "I'm Joe Bugliarelli, I've got a record. Just check my sheet." (Tr. 425). This latter testimony was promptly stricken by Judge Weinfeld and the jury was instructed to disregard it. (Tr. 435). No motion was made for a mistrial.

725, 726, 732, 733); (b) charged that the IRS Agents had lied on the witness stand and in their memoranda of interviews with defendant (Tr. 731-34, 751-52); and (c) alleged that making a case against Bugliarelli was more important to the Government than getting at the truth. (Tr. 737). In addition, Sergeant Blatus, referred to by defense counsel as a "crooked cop," was subjected to searing denunciation. (Tr. 740, 741).

Given these defense tactics, "it is ironic that defense counsel, upon such a record, should have the temerity to attack the prosecutor's summation." *United States* v. *DeAngelis*, 490 F.2d 1004, 1012 (2d Cir.) (concurring opinion), *cert. denied*, 416 U.S. 956 (1974); see *United States* v. *Tramunti*, 513 F.2d 1087 (2d Cir. 1975); *United States* v. *Santana*, 485 F.2d 365 (2d Cir. 1973). We also call the Court's attention to the fact that defendant's appendix distorts the chronological sequence of the summations by placing the Government's rebuttal summation before the defendant's summation.

The next reference to Bugliarelli's record occurred when the wire recording was played for the jury and a transcript of the recording was distributed. Despite the fact that defense counsel had been furnished the transcript nearly two weeks previously and had been alerted to the Government's intention to use the wire recording, no prior objection was made to the reference to Bugliarelli's arrest record. Only after the recording was played, following the close of the Court day, did defense counsel request that the wire recording and transcript references to the defendant's arrest record be stricken and a cautionary instruction again be given. Again no motion for a mistrial was made. On the following day, however, defense counsel withdrew his request for a repetition of the cautionary instruction after the Court ordered the reference in the transcript of the wire recording wherein defendant's arrest record was mentioned deleted. (Tr. 456-57; GX 9).*

The final reference came when Ann Bugliarelli testified. She claimed on direct examination that her husband was a heavy gambler and had a number of gambling arrests and, therefore, impliedly had the wherewithal to accumulate a cash hoard. On cross-examination, to counter the effect of the references to Frank Bugliarelli's arrest record, the Government asked Ann questions about the defendant's arrest record in effort to show he too had engaged in gambling activities. Objections were sustained to these questions.

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* Thus, defense counsel's implication that the Court negligently failed to repeat its cautionary instruction to the jury (Brief at 32) is misleading. Rather, in view of the cautionary instruction given in connection with Blatus' testimony, defense counsel withdrew his request for a cautionary instruction after the reference in the transcript to defendant's arrest record had been deleted. (Tr. 456-57).

The striking of Blatus' testimony with regard to the existence of defendant's record and the cautionary instruction issued by the court renders defendant's contention meritless; for where the trial court immediately strikes a reference to a prior criminal record and the reference was not part of an accumulation of errors, prompt instructions to disregard the reference will cure any error. *United States* v. *Bynum*, 485 F.2d 490, 503 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974); *United States* v. *Stromberg*, 268 F.2d 256, 269 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959); *Tallo* v. *United States*, 344 F.2d 467, 468-69 (1st Cir. 1965).

Furthermore although defense counsel was successful in his effort to have any testimony concerning the defendant's record stricken, he never sought a mistrial on the ground that Bugliarelli suffered incurable prejudice. Since the defendant was content below to rest on the striking of the testimony and the Court's curative instructions, "[h]e could not thus risk the verdict of the jury and if it turned out to be adverse, raise the question that the error was not cured on appeal." *Ladakis* v. *United States*, 283 F.2d 141, 143 (10th Cir. 1960); see *United States* v. *Calles*, 482 F.2d 1155, 1162 (5th Cir. 1973); *Remus* v. *United States*, 291 F. 5012, 510 (6th Cir. 1923), *cert. denied*, 263 U.S. 717 (1924).

In addition, these brief and passing references to the existences of some unspecified arrest record could hardly have been prejudicial. Bugliarelli's discussion of his record on the wire recording came after the jury had heard him not only admit to making illegal payoffs, but also offer to sell a gambling enterprise and attempt to bribe a police officer. Any suggestion that Bugliarelli had some unspecified record would certainly have been far less significant to any juror, even one bent on ignoring the trial judge's instructions, than Bugliarelli's own admissions of involvement in unlawful gambling operations and

his arrest for bribing a policeman. In addition, to the extent that Bugliarelli's reference to his record would have been understood to refer to the fact that he had a record for gambling offenses, the jury had by then heard that he had a close connection to illegal gambling.*

Entirely apart from the above, there are yet other reasons requiring rejection of Bugliarelli's claim. With respect to the claim that the reference to Bugliarelli's record on the wire recording was error, it is important to note that, while defense counsel had previously listened to the wire recording and was given a copy of the transcript of the wire recording several weeks before trial, he failed to raise any prior objection regarding the reference to Bugliarelli's record. See *United States* v. *Gentile*, Dkt. No. 75-1248, slip. op. 239, 252-53 (2d Cir., Oct. 22, 1975). This, in and of itself, vitiates his claim of error. Moreover, it ill-behooves counsel to raise objections to the prosecutor's questions concerning Ann Bugliarelli's knowledge of the defendant's record when he elicited from her, during her direct examination, the fact that her husband, Frank, had been arrested for gambling in support of the contention that Frank Bugliarelli had the wherewithal to accumulate a cash hoard. See *United States* v. *Lubrano*, Dkt. No. 75-1158, slip op. 1361, 1367 (2d Cir., Dec. 30, 1975); *United States* v. *Finkelstein*, Dkt. No. 75-1154, slip op. 841, 859 (2d Cir., Dec. 1, 1975).

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* Had defendant's rap sheet been shown to the jury—which, of course, the Government never sought—it would have shown two felony convictions in the 1950s, one for narcotics trafficking and the other for counterfeiting, approximately ten gambling arrests between 1962 and 1969, and the February, 1972 arrest.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Assistant United States Attorneys, Of Counsel.

Form 279 - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

STEVEN A. SCHATTEN, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 12th day of January, 1976 he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Wallace Musoff, Esq.
Wagman, Cannon & Musoff, P. C.
136 East 57th Street
New York, New York 10022

And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing at Foley Square ~~One St. Andrew's Plaza~~, Borough of Manhattan, City of New York.

Steven A Schatten

Sworn to before me this
12th day of January, 1976

Angus Macbeth

ANGUS MACBETH
Notary Public, State of New York
No. 31-7645200
Qualified in New York County
Commission Expires March 30, 1976